RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
DEC 21 2016

No. 15-827

In the Supreme Court of the United States

ENDREW F., A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT
FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION; CASE, THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION; THE ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL; AND FIVE OTHER EDUCATIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*?

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INTEREST OF *AMICI CURIAE*[1]

Amici have a keen interest in this case because state and local education agencies bear "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). *Amici* represent local educational officials who serve on the front line of providing education services to all children attending public schools, including the nearly 7 million children with disabilities who account for between three and nine percent of total enrollment, depending on age.[2]

AASA, The School Superintendents Association (AASA), founded in 1865, is the professional organization for some 10,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school

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[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

[2] U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2016, 250 ("ANNUAL REPORT"), http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf. For children under age 3, 2.9% of students receive federal funding; for children ages 3-5, Part B funding accounted for 6.1% of total students in 2012; for children ages 6–21, the percentage was 8.7% in 2014. *Id.* at xxiii–xxiv.

system leaders. Throughout its more than 150 years, AASA has advocated for the highest quality public education for all students, and provided programing to develop and support school system leaders. AASA members advance the goals of public education and champion children's causes in their districts and nationwide.

CASE, the Council of Administrators of Special Education, is an international non-profit professional organization providing leadership and support to approximately 4200 members who are dedicated to enhancing the worth, dignity, potential, and uniqueness of students with disabilities. Its mission is to provide leadership and support to members by shaping policies and practices that impact the quality of education. The membership is comprised primarily of local school district administrators of special education programs. CASE is a division of the Council for Exceptional Children (CEC), which is the largest professional organization representing teachers, administrators, parents, and others concerned with the education of children with disabilities.

The Association of School Business Officials International (ASBO), founded in 1910, is an educational association that supports school business professionals who are dedicated and trustworthy stewards of taxpayers' investment in public education. Through its members and affiliates, ASBO International represents approximately 30,000 school business officials who manage educational resources effectively and efficiently to support student achievement.

The National Association of Elementary School Principals (NAESP) is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. The Association believes that the progress and well-being of the individual child must be at the forefront of all elementary and middle school planning and operations. As the representative of the nation's school leaders serving more than 33 million children in grades pre-kindergarten through 8, the Association serves as a leading advocate for children and youth, ensuring every student has access to educational opportunities, and promoting education as a matter of national priority.

The National Association of Secondary School Principals (NASSP) is the leading organization of and voice for middle and high school principals, assistant principals, and school leaders from across the United States and in over 35 countries around the world. Founded in 1916, NASSP's mission is to connect and engage school leaders through advocacy, research, education, and student programs.

The Association of Educational Service Agencies (AESA) is a professional organization serving over 500 regional educational service agencies (ESAs) in 45 states throughout the nation. AESA members reach over 80% of public school districts, over 83% of private schools, over 80% of certified teachers, more than 80% of non-certified school employees, and well over 80% of public and private school students. ESAs provide support services such as professional development, itinerant employees, technology support,

transportation support, and leadership development to their member districts.

The National Association of Federally Impacted Schools (NAFIS), established in 1973, is a nonprofit membership association that represents public school districts across the country that receive federal Impact Aid funding. NAFIS members are geographically and demographically diverse school districts—many educate a significant population of Native American and military-connected students. NAFIS advocates for, and offers professional development to, the administrators and school board members of federally-impacted school districts.

The National Rural Education Association (NREA) is the leading national organization providing advocacy to enhance educational opportunities for rural schools and their communities. NREA's mission is to provide a unified national voice to address the needs and concerns of rural education and communities. NREA believes that all citizens are entitled to the same quality education regardless of socio-economic background or geographic location.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici can attest that the country's educators are already aiming high. Such aspirations, shared by educations and parents alike, should not be conflated with the separate question of how courts should assess whether a free and appropriate public education has been provided, which turns on the role generalist judges should play in settling disputes about the

likelihood of success of an individualized education program built on complex methodological choices.

In *Rowley*, this Court already determined that a free and appropriate public education (FAPE) is offered when the education program "confer[s] some educational benefit." 458 U.S. at 200. Since then, Congress has amended the IDEA various times, and twice enacted major legislation reauthorizing and modifying the Act.[3] Yet it has left the definition of FAPE essentially unchanged.

Not only has Congress acquiesced in the *Rowley* standard through repeatedly declining to amend the FAPE definition, the 2004 standards that Congress enacted to guide determinations in administrative hearings, 20 U.S.C. § 1415(f)(3)(E), codified case law applying *Rowley* and reinforced the "some benefit" standard. Particularly because the IDEA is Spending Clause legislation where States must be on clear notice of the conditions attached to federal funding—funding which covers only a paltry portion of the cost of special education—courts should not engraft a new substantive standard.

Jettisoning *Rowley*'s "some benefit" standard will also be unworkable and counter-productive. There has not been, and will not be, a race to the bottom applying *Rowley*. Under the current framework, educators focus on working collaboratively with parents to craft a

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[3] *See* Individuals with Disabilities Education Improvement Act of 2004 (2004 IDEA Amendments), Pub. L. No. 108-446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997 (1997 IDEA Amendments), Pub. L. No. 105-17, 111 Stat. 37; *see generally* Pet. Br. 6–8.

uniquely-tailored "individualized education program" (IEP) in accordance with rigorous process-based standards set forth by Congress. These IEP procedures, now even more demanding and substantive than when *Rowley* was decided, ensure that educators set high goals for students with disabilities.

Under the governing standard, courts can readily check whether an IEP has been properly crafted in accordance with the detailed statutory criteria. Not so for a new and imprecise heightened standard created from whole cloth. As *Rowley* recognized and Congress later reinforced in § 1415(f)(3)(E), it is unworkable to have generalist hearing officers and judges who are untrained in educational methodologies second-guess the judgments of educational experts working daily with the student that the IEP is designed to support. Instead, the rational basis-type review adopted in *Rowley* and endorsed by Congress appropriately asks courts to assess only whether an IEP was reasonably calculated to enable the child to receive some educational benefit.

Imposing a heightened standard will not only require second-guessing by ill-equipped courts and measurement against markers that Congress never set, it will redirect resources from providing education services to fighting court battles. The irony, therefore, is that the "substantially equal opportunity" standard advocated for by Petitioner, but tellingly not the United States, will likely make things more unequal, by spurring litigation and favoring families with more resources that can better afford to litigate.

Ultimately, there is no warrant to reinvent the FAPE requirement. The IDEA, and the intertwined

substantive standards from other educational statutes that it incorporates, have never been more successful at delivering special education services and improving the performance of students with disabilities. Educators are already aiming high, courts are playing the role that Congress contemplated, the *Rowley* standard is working, and the judgment below should be affirmed.

ARGUMENT

I. UNDER IDEA'S MODEL OF COOPERATIVE FEDERALISM, ONLY CONGRESS CAN REDEFINE FAPE, AND CONGRESS HAS EMBRACED *ROWLEY*.

A. Because IDEA Is a Spending Clause Statute, Congress Must Speak Clearly to Impose New Obligations on the States.

The essential starting point for construing the IDEA, a Spending Clause statute, is that any conditions upon the receipt of federal funds must be set out "unambiguously." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). When Congress acts under its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

It defies credulity to think that the meaning of FAPE, a concept that permeates the statute and forms the core of "the educational programs IDEA directs school districts to provide," *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring), could be reinvented without express proclamation by Congress and agreement by

the States. Provision of FAPE is the single-most litigated aspect of the Act.[4] Congress could not and would not *sub silentio* change the rules of the game about this core concept.[5]

Sticking to the terms of the statutory bargain is all the more essential here because the federal government is not, and was never meant to be, an equal partner under the IDEA. Congress originally called for a federal contribution of 40% of the estimated additional costs of providing education services to students with disabilities. *See* Pub. L. No. 94-142, 89 Stat. 773; § 1401(a)(B)(v). But the federal government has yet to meet that already-less-than-equal goal and consistently contributes less than half of their authorized share through annual appropriations, resulting in a federal shortfall that has only increased over time.

In fiscal year 2014, IDEA federal funding covered a mere 16 percent of the estimated excess cost of educating children with disabilities; the roughly $18

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[4] *See* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education,"* 28 J. OF NAT'L ASS'N OF ADMIN. L. JUDICIARY 397, 402 n.17 (2008).

[5] The centrality of FAPE to the statute is thus distinguishable from "lower key" provisions that members of this Court have questioned should be subject to the *Pennhurst* "clear notice" rule. *See, e.g., Arlington*, 548 U.S. at 305 (expert fee issue was "lower key" because it "concern[ed] not the educational programs IDEA directs school districts to provide, but 'the remedies available against a noncomplying [district].'") (Ginsburg, J. concurring in part and concurring in the judgment) (quoting *id.* at 317, Breyer, J., dissenting).

billion shortfall has been assumed by the States and local school districts.[6] Since 2009, the average federal share per child has remained stagnant, while average per pupil expenditure has risen about 1 percent per year. The result: a steadily declining federal contribution to the costs of educating students with special needs.[7] And since 1981, the only year that the federal contribution has ever reached the 40% statutory goal, the federal share has been less than half of the federal commitment.[8]

The IDEA is said to be a "model of cooperative federalism," *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). But it is hardly "cooperative" to unilaterally—and silently—impose a heightened FAPE standard upon the States, particularly when the federal government has proved unable to uphold its end of the funding bargain. The States never received the requisite clear notice (or any notice) of either of the newly-minted standards proposed by Petitioner or the United States. The proposed standards are at odds

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[6] IDEA Part B "full funding" for FY 2014 would have amounted to approximately $28.65 billion, about $17.17 billion more than was appropriated. *See* Clare McCann, *IDEA Funding*, EDCENTRAL, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/.

[7] COMMITTEE FOR EDUCATION FUNDING, EDUCATION MATTERS: INVESTING IN AMERICA'S FUTURE 149, http://cef.org/wp-content/uploads/2015/03/2015FullBudgetBook-March-31.pdf.

[8] *Id.*; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-2, SPECIAL EDUCATION: MORE FLEXIBLE SPENDING REQUIREMENT COULD MITIGATE UNINTENDED CONSEQUENCES WHILE PROTECTING SERVICES 7 (2015).

with each other, unmoored from the statutory text, and have yet to be considered, much less adopted, by any appellate court. Only Congress can so rewrite the bargain struck under the IDEA, thereby affording States the choice to accept or decline any new terms.

B. *Rowley*'s "Some Benefit" Test Remains Good Law, and Was Endorsed by Congress in 2004 in Section 1415(f)(3)(E).

1. In *Rowley*, a case "present[ing] a question of statutory interpretation," 458 U.S. at 179, this Court grappled with the meaning of "free appropriate public education," the "principal substantive phrase used in the Act." 458 U.S. at 187. *Rowley*'s core holding, independent of its facts, was that a "free and appropriate public education" occurs "by providing [at public expense] personalized instruction [that comports with the IEP process] with sufficient support services to permit the child to benefit educationally from instruction." *Id.* at 203-204. The Court expressly declined to establish "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Instead, the Court held that any inquiry into the provision of FAPE should be twofold: 1) whether the school district complied with IEP procedures; and 2) whether the IEP "developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207.

Despite the many changes to the IDEA since *Rowley* was decided in 1982, it is undisputed that Congress left the core definition of FAPE intact. *Compare* 20 U.S.C. § 1401(9), *with* Pub. L. No. 94-142, § 602(18), 89 Stat.

773, 775. And although the Act now reflects heightened aspirations and includes more accountability mechanisms, it remains the case today, as in 1982, that "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded to handicapped children." *Rowley*, 458 U.S. at 190. Equally true today, as well, is that there are "infinite variations" in the degree of educational "benefits obtainable by children" given the "wide spectrum" of varying needs that are eligible for services under the Act. *Id.* at 202.

2. *Stare decisis* arguments, *see* Resp. Br. 22-24, thus apply with special force, as Congress has left the key definition of FAPE unchanged despite repeated opportunities for revision. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts that statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009). And Congress has never amended the FAPE definition in response to *Rowley*, even as Congress has shown itself well-able to amend the IDEA when it wants to respond to this Court's rulings. *See* 20 U.S.C. § 1403 (providing a clear waiver of sovereign immunity after *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), which held that Congress's intent in abrogating a State's immunity under a previous version of the Act was not sufficiently clear). *See also Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409-2410 (2015) (recognizing the strength of *stare decisis* in statutory rulings, especially when there is "long congressional acquiescence" in the holding at issue). This Court should reject arguments to either reinvent *Rowley*, rewrite the statute, or both.

Both Petitioner and the United States disclaim any intent to overrule *Rowley*, yet Petitioner's standard is indistinguishable from one that *Rowley* rejected,[9] while the United States reinterprets *Rowley* beyond recognition, parsing the case as if it were a statute, and eliding the critical statutory text. The definition of FAPE, and the absence of any prescribed substantive standard for children receiving federal funds under the Act, remain unchanged. *Rowley*'s holding turned on these core statutory characteristics and there is no warrant for jettisoning the "some benefit" rule.

3. Congressional support for the *Rowley* rule is manifest by more than mere acquiescence. In 2004, Congress added Section 1415(f)(3)(E) to the Act.[10] Meant to guide the hearing officers that conduct the first round of due process hearings,[11] the chosen language echoes and reinforces *Rowley*'s "some benefit" standard. The initial subsection provides that a determination of whether a child has received FAPE should be made on "substantive grounds." 20 U.S.C. § 1415(f)(3)(E)(i). Congress declined to specify any quantum of substantive attainment or requisite degree of progress. This is fully consistent with *Rowley*'s "some benefit" standard, as "some," in this context, means "being of an unspecified amount."[12]

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[9] *Rowley* expressly rejected a "commensurate opportunity" standard, 458 U.S. at 189–190. *See also* Resp. Br. 17–19.

[10] The complete provision is set forth in the appendix.

[11] *See* 20 U.S.C. §§ 1415(b)(6), 1415(f)(1), 1415(i)(2)(A), 1415(g).

[12] *See Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

In the second subsection, Congress reinforced core procedural protections, like the right of parents to participate in the decision-making process, providing that failure to comply would result in an automatic denial of FAPE, 20 U.S.C. § 1415(f)(3)(E)(ii)(II). But for other procedural errors, Congress again echoed *Rowley*, stating that FAPE is denied when a "deprivation of educational benefit" results. *Id.* § 1415(f)(3)(E)(ii)(III). This provision codified extant case law applying *Rowley* and developing a harmless error standard. *See, e.g., Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565-566 (6th Cir. 2000) (applying *Rowley* "some benefit" rule, employing harmless error standard like § 1415(f)(3)(E) and collecting cases from other circuits); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001); *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Nor is Petitioner's suggestion (Br. 34) that Section 1415(f)(3)(E) heightened the reviewing standard supported by the legislative history. The Senate Report clarifies that the "substantive grounds" requirement aimed to make review *less* intrusive, by avoiding denials of FAPE based on "a mere procedural technicality." S. Rep. 108-185 (2003) at 40.

In contrast to this explicit congressional endorsement of the *Rowley* standard in § 1415(f)(3)(E), there is no similar textual anchor for the standard proposed by Petitioner. Hortatory language in the statutory findings cannot supplant the unchanged FAPE definition, or the guideposts echoing *Rowley* in § 1415(f)(3)(E), particularly in the Spending Clause context where conditions must be stated clearly. *See Pennhurst*, 451 U.S. at 24 (concluding that statutory

finding provisions "were intended to be hortatory, not mandatory"). And the fact that the United States and Petitioner cannot agree on the proper standard is yet further proof that neither the "substantially equal opportunity" standard that Petitioner proposes, nor the "significant educational progress" standard urged by the United States, is mandated by the statute's text.

In sum, Congress has not authorized—and the States have not agreed—for courts to play any more intrusive a role in determining whether FAPE has been provided than already articulated in *Rowley*: is there a "basic floor of opportunity" that is reasonably calculated to yield "some educational benefit." 458 U.S. at 200.

II. THE IEP PROCESS AND OTHER FEDERAL STATUTES ALREADY ENSURE THAT SCHOOL DISTRICTS AIM HIGH; ASKING JUDGES TO SECOND-GUESS EDUCATORS' INFORMED DECISIONS WILL ONLY INCREASE LITIGATION AND INEQUALITY.

Suggestions by Petitioner, the United States, and some supporting *amici* that the *Rowley* standard condones a race to the bottom are baseless. As Justice Stevens recognized in his concurrence in *Schaffer*, "[w]e should presume that public school officials are properly performing their difficult responsibilities under this important statute." 546 U.S. at 62-63. Petitioner's assertion that maintaining the *Rowley* standard will encourage educators to "aim[] for educational achievement that barely exceeds the trivial" (Br. 17) wrongly conflates the inquiry that courts must undertake to determine whether a child has received

FAPE with the separate and distinct question of how school districts pursue statutory goals through compliance with the detailed procedures set forth in the Act.

Judicial deference to complex methodological choices does not encourage educators to aim low, it empowers them to aim high. *Rowley*'s non-intrusive standard allows multidisciplinary teams to craft the best options for the child at hand, without risk of being second-guessed by a hearing officer or judge who lacks the expertise to assess the comparative worth of different educational approaches. In fact, the IDEA makes clear, through rigorous procedural requirements, that school districts *must* aim high in assessing the needs of children with disabilities and in providing personalized special education services.

The notion that school districts commonly reject methods and approaches that could be helpful to a child under the guise that they are already "doing enough" not only presumes, without foundation, the worst about educators, it completely ignores the accountability measures emphasized in and enforced by the IDEA, and interwoven statutes like the Elementary and Secondary Education Act (ESEA). *See* Resp. Br. 7. The IDEA's distinct emphasis on stringent *process-based* protections ensures that individualized programs are "tailored to the unique needs" of each child, *Rowley*, 452 U.S. at 181, and seek "ambitious but achievable" educational benefits.[13]

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[13] U.S. Dep't of Educ., Dear Colleague Letter at 5 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

Congress's consistent refusal to set any specific substantive marker against which FAPE should be measured confirms that compliance with congressionally-mandated processes and accountability mechanisms should, per *Rowley*, be the focus of judicial review. *See* § 1415(f)(3)(E)(ii). Extra-statutory and nebulous concepts of "substantial educational benefit" (as the petition for certiorari advocates), or "substantially equal opportunity" (as Petitioner now argues), or "significant educational progress" (urged by the United States) are all standards that courts are ill-equipped to evaluate or measure, and which, ultimately, will engender more litigation and more inequality, without necessarily improving educational outcomes.

A. The IEP Process Is Laden with Substantive Benchmarks and Ensures that Educators Aim High.

1. An Individualized Education Program, or IEP, forms the nucleus of the IDEA's guarantee of FAPE for children with disabilities. *See* 20 U.S.C. § 1401(9); § 1414(d)(1)(A). An IEP is "the centerpiece of the statute's education delivery system," *Honig v. Doe*, 484 U.S. 305, 311-312 (1988), and is the "modus operandi" of the Act, *Sch. Committee of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985).

An IEP is produced through an intensive collaborative effort by families and schools to assess and address a child's unique learning issues. *See* 20 U.S.C. § 1414(d). The IDEA prescribes "elaborate and highly specific procedural safeguards," *Rowley*, 458 U.S. at 205, that educators must follow in developing

an IEP—including measures directed at the substantive quality of the resulting plan. As Petitioner and the United States recognize, the rigors of the IEP process have only increased since *Rowley*. Pet. Br. 36-40; U.S. Br. 21.

For example, the IEP must articulate "measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general educational curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(II). The IEP must specify the special services to be provided to permit the child "to advance appropriately toward attaining the annual goals." *Id.* § 1414(d)(1)(A)(i)(IV).

Moreover, the programs, curricula, and services that schools offer each child must be based on "peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *see also id.* § 1400(c)(5)(E) (endorsing the use of "scientifically based instructional practices, to the maximum extent practicable"). Parents—integral members of the "IEP Team" that develops, reviews, and revises the program for a child, 20 U.S.C. § 1414(d)(1)(B)—can accept or reject the school's suggested educational practices from being incorporated into an IEP. The goal of the multidisciplinary IEP team is to ensure the greatest likelihood of success given the unique circumstances of each child.

The IDEA builds in other procedural mechanisms to confirm that the IEP is substantively sound and workable in practice. The child's progress is carefully monitored through periodic reports from the school district, 20 U.S.C. § 1414(d)(1)(A)(i)(III), and the IEP must be reviewed and, where necessary, revised at

least once a year to ensure that annual goals are being achieved, § 1414(d)(4)(A). And in the event a parent files a due process complaint, the statute and implementing regulations require the school district to convene a resolution meeting to try to solve problems without litigation. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

These measures do much more than set forth meaningless procedural niceties. Rather, they work in concert to ensure that the IEP is substantively appropriate and "individually designed to provide educational benefit" to the child. *Rowley*, 458 U.S. at 201. Far from indicating that the *Rowley* "some benefit" standard is too low, these increased procedural protections and accountability measures reinforce *Rowley*'s central conclusion that compliance with the IEP process, itself, usually is enough to attain the desired substantive benefit. 458 U.S. at 206.

2. The IEP process, moreover—and the IDEA as a whole—does not operate within a vacuum. Congress has also legislated outside the IDEA to encourage States to adopt high standards for special education students. There is thus even less warrant to impose extra-statutory substantive requirements. As Petitioner points out at length (Br. 26–28), the IDEA works in conjunction with the Elementary and Secondary Education Act (ESEA), which requires States to adopt "challenging academic content standards and aligned academic achievement standards" for "all students," including those with disabilities. 20 U.S.C. §§ 6311(b)(1)(A)–(B), 6311(b)(2)(B)(vii)(I). While the ESEA permits the use of "alternate academic achievement standards for

students with the most significant cognitive difficulties," *id.* § 6311(b)(1)(E), even these are subject to the ESEA's "challenging State academic content standards," *id.* § 6311(b)(1)(E)(i)(I), and "must reflect professional judgment as to the highest possible standards achievable by" such students, *id.* § 6311(b)(1)(E)(i)(III). School districts are also subject to statewide accountability systems, which must consider the performance of students with disabilities compared to that of their non-disabled peers and require schools to address consistent underperformance of students with disabilities. *Id.* § 6311(c)(2)(C) (identifying children with disabilities as a "subgroup of students" for accountability purposes); *id.* § 6311(d)(2)(A)–(C) (requiring "targeted support and improvement" for schools in which "any subgroup of students is consistently underperforming"). *See also Resp.* Br. 6-7 (describing "systemic conditions" that States must satisfy to receive federal funding for education)

To maintain conformity with the IDEA and ESEA, then, educators simply cannot—contrary to Petitioner's suggestions—aim to barely clear the bar by seeking minimal benefit and limited progress for students with disabilities. Instead, the IEP process itself, bolstered by the ambitious goals and accountability mandated by the ESEA, purposefully bakes in rigorous and thoughtful consideration of each child's needs and holds school districts accountable for each child's progress. These mandates ensure that school districts and parents "aim high" while crafting the IEP, with clear goals tethered to state standards in place, but at the same time preserve the flexibility of educators to

make informed judgments about how best to help each student to succeed.

B. The *Rowley* Standard Properly Envisions a Judicial Check on Substantive Adequacy that Is Akin to Rational Basis Review.

1. The significant procedural requirements imposed by the IDEA naturally and intentionally spur the generation of meaningfully substantive education programs. *Rowley* is premised on "the importance Congress attached to these procedural safeguards," 458 U.S. at 205, and recognizes that any further evaluation of an IEP's substantive adequacy is properly limited to a rational basis-style review of assessing whether, on the whole, the program was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206–207. And as the cases detailed in Part III, *infra*, demonstrate, this standard is far from toothless.

Given the inter-circuit muddle regarding the proper formulation of the *Rowley* standard, *see* Pet. App. 17a-18a & n.8, this Court can clarify that *Rowley*'s "reasonably calculated to achieve some educational benefit" standard is a non-intrusive rational-basis-type check, already blessed by Congress in the criteria for hearing officers' decisions, not a newly-minted test that would disrupt the entire statutory scheme.[14]

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[14] Harping on the specific "merely more than de minimis" phrasing used sometimes by the Tenth Circuit elevates form over substance. *See e.g.*, *O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 358-359 (4th Cir. 2015) ("[W]e have never held 'some' educational benefit means only 'some minimal academic advancement, no matter how trivial.'").

Rowley's "reasonably calculated" language resembles the rational basis test used in other contexts where courts have recognized the impropriety of second-guessing substantive policy judgments that are better made by others. *See Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033 (2012) (statute passes rational basis inspection when "reasonably related" to interests being served) (internal quotations and citations omitted). This non-intrusive inquiry makes sense because, like the legislative process, the development of an IEP can be messy and complex, often involving nuanced educational choices and compromises in service of attaining sometimes conflicting objectives that are exceedingly difficult for a court to appraise post hoc. There is no magical "right answer" for any given child or situation, no sure-fire methodology for teaching every child to read or do math or learn self-control. The *Rowley* standard lets generalist judges steer clear of making difficult choices between equally viable educational alternatives, while providing a substantive check that ensures educational benefit. *See* Part III, *infra*.

2. The U.S. Department of Education's What Works Clearinghouse—which "reviews the existing research on different programs, products, practices, and policies in education" to "provide educators with the information they need to make evidence-based decisions"—lists dozens of different instructional methodologies that "work" for various skills and learning problems. WWC: FIND WHAT WORKS! http://ies.ed.gov/ncee/Wwc/ (last visited Dec. 17, 2016). For literacy alone, the Clearinghouse catalogs 69 possible methodological interventions (all supported by "high-quality research") using a wide array of

intervention tools, including computer software, group instruction, and peer tutoring. *Id.*

Even established "best practices" do not guarantee the same results for each child, and are not uniformly carried out with the same fidelity for every student in every system, often due to factors outside a school's control, such as home environment or family situation. *Cf.* U.S. Dep't of Educ., Dear Colleague Letter at 6 ("[B]ecause the ways in which a child's disability affects his or her involvement and progress in the general education curriculum are highly individualized and fact-specific, the instruction and supports that may enable one child to achieve at grade-level may not necessarily be appropriate for another child with the same disability.") Each student's unique cognitive profile and learner characteristics, in other words, must be accounted for, and all while schools are obligated to meet many different learning standards, not focus only on a few isolated skills.

Autism spectrum disorder, to take one example, manifests itself in myriad presentations (*e.g.*, social communication impairments, atypical body movements, sensory challenges, behavioral problems, etc.), with symptoms that may change over time. *See* NAT'L AUTISM CTR., EVIDENCE-BASED PRACTICE AND AUTISM IN THE SCHOOLS: AN EDUCATOR'S GUIDE TO PROVIDING APPROPRIATE INTERVENTIONS TO STUDENTS WITH AUTISM SPECTRUM DISORDER 20–23 (2d ed. 2015).

Unsurprisingly, there are *many* research-based interventions that are appropriate to utilize with students with autism, from behavioral interventions to modeling to pivotal response training. *See id.* at 32–64 (summarizing fourteen different "established" evidence-

based interventions and identifying eighteen additional "emerging" interventions). Selecting and implementing the most appropriate interventions for a single child struggling with particular issues requires, among other things, careful consideration of that child's specific needs and history, ample understanding of each method and awareness of new research and findings, and ongoing "data collection" about what measures actually lead to student improvement. *See id.* at 66–94 (providing guidance on the selection, implementation, and assessment of interventions).

Professional judgment and experience are vital to such decisionmaking. Educators use their expertise, together with active input from parents—working against the statutorily-mandated IEP benchmarks—to make the best choices they can at the time to craft a specialized program that will most effectively address the unique needs of the student. School teams are best positioned to make recommendations for a student given that student's individual needs and learning profile, based on the team's expertise and experience of what has worked for their students and in their schools in the past. *Amici*'s members have seen countless instances where parents with initial misgivings about the school team's methodological choices end up more than satisfied with the results. These success stories, however, do not get litigated.

3. The standard at issue here comes into play only in the event of a disagreement that cannot be resolved, when a due process hearing is requested. 20 U.S.C. § 1415(f)(1)(A). And because procedural violations can alone be sufficient to deny FAPE, *Rowley*, 458 U.S. at 206, the standard has work to do only when a

procedurally-compliant IEP—*i.e.*, one that, *inter alia*, sets measurable goals designed to ensure progress in the general education curriculum—is nonetheless decried as insufficient.

It is one thing for generalist judges to review whether an IEP was reasonably calculated to result in some educational benefit. It is quite another for them to determine which of several instructional alternatives is likely to generate some undefined quantum of benefit over another. The *Rowley* standard is workable precisely because "[o]nce the determination is made that the IEP was adequate, that ends the inquiry. [Judges] need not consider whether other programs would be better." *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 86 (1st Cir. 2004) (citing *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948–949 (1st Cir.1991)). *Rowley* thus made clear that under the IDEA there is no entitlement to the "best" program and courts need not choose between two proven methodologies. *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade Cty., Fla.*, 437 F.3d 1085, 1102 (11th Cir. 2006) (citing *Rowley*, 458 U.S. at 204); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("*Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.") (citations omitted).

Relieving judges of the impossible task of deciding which educational methodology might work best (when both alternatives work) makes sense. Because choosing between competing methodologies is not the

comparative advantage of generalist judges. Judges, in any context, "are not final because [they] are infallible, [but are only] infallible because [they] are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring). Yet under the inherently comparative standards proposed by Petitioner and the United States, generalist judges are given the last word on evaluating the likelihood of success of complex methodological choices.

In *Amici*'s view, asking administrative hearing officers or judges, who typically lack educational know-how, to determine which method of instruction is more likely to yield a subjectively-valued result undermines the very purpose of the multidisciplinary school teams and the IEP process itself, which is to create a structured and collaborative process steeped in knowledge and experience. "[M]ost issues that arise in hearings demand expertise concerning disability and education, not law." S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. OF THE NAT'L ASS'N OF ADMIN. L. JUDICIARY 544, 563 n.53 (2012). There is wide variation in the quality and type of hearing officers across the country, and "[m]any hearing officers are faced with the obligation to decide among proposals that they are not well trained to evaluate." *Id.* at 551.

Courts, as well, "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Rowley*, 458 U.S. at 208 (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). And "[c]ognizant that judges lack the on-the-ground expertise and experience of school administrators," this Court has

repeatedly "cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'" *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 686 (2010) (quoting *Rowley*, 458 U.S. at 206). Thus, when reviewing FAPE determinations, federal courts are typically mindful that they "lack 'the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'" *T.K. v. N.Y. City Dep't of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016) (quoting *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 240–241 (2d Cir. 2012)).

But that is exactly what the heightened review standard espoused by Petitioner invites hearing officers and federal courts to do: "resolve ... difficult questions of educational policy." *Id.* Petitioner would have hearing officers and federal judges, in hindsight and without the benefit of experience and context, make judgments as to whether certain interventions should have been employed over others or which outcomes qualify as "meaningful" or "substantial" or "significant" enough.

Judges cannot make such qualitative calls without engaging in precisely the type of hindsight analysis that the circuits have roundly rejected. *E.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective."); *O'Toole By & Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701–702 (10th Cir. 1998) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement."); *R.E. v. New*

York City Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012) (collecting cases and adopting the "majority view that the IEP must be evaluated prospectively as of the time of its drafting."). Neither Petitioner nor the United States challenge this "snapshot rule," under which "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Yet, under the standards urged by Petitioner and the United States, judges will inevitably be enticed into relying on "hindsight evidence" to unfairly second-guess well-intentioned multidisciplinary teams that exercised their best-informed judgment when crafting an IEP. In contrast, the "reasonably calculated to achieve some benefit" standard from *Rowley* is a fully adequate and workable substantive check that reflects the relative distribution of expertise between courts and educators, honors congressional intent, and respects the good faith efforts of educators while avoiding the risk of impermissible hindsight rulings.

"[E]ducation of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The more "robust" substantive review standards proposed by Petitioner and the United States insist otherwise by asking generalist federal judges to unsuitably intrude upon the province of educators. Neither the statutory scheme of the IDEA nor this Court's precedent supports such a change.

C. Heightened Substantive Standards Are Unworkable and Counter-Productive.

Beyond the incongruity with principles of federalism, the IDEA's text, and this Court's decisions, the (many different) standards offered by Petitioner and its *amici* also fail more pragmatic tests. How could a court possibly apply them in practice, especially when they diverge from congressionally-mandated standards for hearing officers? Petitioner does not say. Nor does Petitioner address the likely systemic consequence of engrafting a heightened substantive standard onto the IDEA: increased inequality in special education, between the have-nots and the have-enoughs-to-litigate.

1. Tellingly, neither Petitioner nor the United States attempt to apply their proposed standards to the facts of this case. It thus remains a puzzle as to how judges are to apply the recommended standards—whether characterized as "substantial benefit" or "substantially equal opportunity," or "significant educational progress"—in evaluating an IEP. And it is simply unrealistic to assume that courts will have the time and capacity to fully assess whether a certain practice employed by a school district is providing a child with sufficient educational benefit (or opportunity) as compared to countless other potential approaches which were not pursued, often for good reason.

The murky and subjective nature of the alternative standards proposed—how meaningful is "meaningful"? "Substantially equal" to what? What constitutes sufficiently "significant" progress?—would leave educators in the dark as to what, exactly, an IEP must

do to survive judicial review. The *Rowley* standard, in contrast, defers to the expertise of educators and recognizes that the substantive goals of the IEP process are best ensured through enforcement of its clear procedural protections, subject only to a rational-basis type substantive check.

Imposition of a qualitative assessment beyond the test that Congress has mandated for hearing officers, moreover, is simply unworkable. Petitioner insists that the "standard of review courts should apply when assessing the adequacy of IEPs is not at issue here," Pet. Br. 49, because their test "simply describes the level of education schools must strive to deliver." *Id.* Yet judges review the administrative decisions of hearing officers. And Petitioner challenges neither the substantive review criteria used at administrative hearings, nor the governing standard of judicial review of administrative decisions.

Courts currently engage in an independent, but circumscribed, review, "more critical . . . than clear-error review but . . . well short of complete *de novo* review," of administrative decisions. *C.F. ex rel. R.F. v. N.Y.C. Dep't of Educ.*, 746 F.3d 68, 77 (2d Cir. 2014) (quotation marks omitted). They give "due weight" to the state proceedings, affording particular deference where "the state hearing officers' review has been thorough and careful." *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 241 (2d Cir. 2012) (quotation marks omitted).

But how can courts give "due weight" to the decisions of hearing officers if they are applying an entirely different test in determining whether a child has received FAPE? If judges apply one standard, and

hearing officers another, deference to administrative rulings offers no aid to generalist judges who wish to avoid making hard educational choices under the standards proposed by Petitioner and the United States. The result would be not only "permi[ssion] simply to set state decisions at nought," *Rowley*, 458 U.S. at 206, but arguably a requirement to do so. Such intrusive review would surely frustrate the "very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP." *Id.*

2. That Petitioner and the United States only tell, but do not attempt to show, how their respective standards would be outcome-determinative here proves not only that their standards are unworkable, but also that imposition of a new subjectively assessed test by reviewing courts may not even affect educational outcomes. While the educational results are uncertain, the costs are not: Changing the standard will lead to more litigation, likely resulting in the lopsided allocation of already limited resources.

Thus, the "substantially equal opportunity" standard advocated for by Petitioner will, ironically, generate greater inequality, by spurring litigation and favoring families with more resources that can better afford to litigate. The "cost and complexity of a due process hearing hinder low- and middle-income parents from [participating in them]. IDEA's complex protocols and mandates disproportionately benefit wealthy, well-educated parents, who can deftly and aggressively navigate the due process system with the aid of private counsel and paid education experts." *See* SASHA PUDELSKI, AASA, RETHINKING SPECIAL EDUCATION DUE

PROCESS, 7 (April 2016).[15] Educational outcomes may suffer too, as school districts often opt to yield to litigious parents, even against their best judgment, simply to avoid the costs of litigating. *Id.* at 3 (discussing results of a survey of 200 randomly selected school superintendents).

School districts across the country are already struggling with litigation costs, "spend[ing] over $90 million per year in conflict resolution," and data from the most populated states indicate that the annual number of due process hearing requests continues to increase. *Id.* at 23. Changing the rules of the game and imposing a heightened fuzzy standard different from the standard Congress mandated for hearing officers will only increase incentives to litigate, as dissatisfied parties seek reversal in court under a new and malleable standard.

Fomenting litigation runs directly counter to congressional intent, as "Congress has repeatedly amended the Act to reduce its administration and litigation-related costs." *Schaffer*, 546 U.S. at 59 (describing, *inter alia*, the 2004 amendments adding mandatory "resolution sessions" in § 1415(f)(1)(B) and 1997 amendments mandating that States offer mediation in § 1415(e)). Accountability mechanisms added through the ESEA and its predecessors, moreover, offer alternatives to litigation to ensure that districts are getting desired results, like establishing a complex set of compliance indicators and related

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[15] *Available at* http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

penalties for school districts, including the potential loss of funding. PUDELSKI, RETHINKING SPECIAL EDUCATION DUE PROCESS, at 7; Resp. Br. 7-8.

In short, Congress wanted the ambitious goals set in 2004 to be achieved not through increased litigation, but by giving "[p]arents and schools . . . expanded opportunities to resolve their disagreements in positive and constructive ways." *See* 20 U.S.C. § 1400(c)(8). Increasing incentives to litigate by imposing an unworkable judicial standard different than the one Congress mandated for administrative hearings runs directly counter to Congress's intent.

III. THE "SOME BENEFIT" STANDARD IS WORKING TO ATTAIN THE IDEA'S GOALS.

As Congress's decision to leave the FAPE standard unchanged reflects, the *Rowley* standard is working. Never before have special education students been integrated so well, and achieved so much, as they have today. Petitioner and his *amici* offer no evidence to the contrary. Instead, they offer parade-of-horribles hypotheticals that they assume could occur unless this Court re-writes the IDEA to reject the *Rowley* standard. But a review of actual experience demonstrates that the courts faithfully applying *Rowley*'s "some benefit" standard are effective guardians against denials of FAPE. There is no reason for this Court to "fix" a system that not only is not broken, it is thriving.

1. The data belie any claim that the *Rowley* standard results in a race to the bottom by school districts, leading to low expectations and minimal

progress for students with disabilities in public schools. *See* Pet. Br. 17; U.S. Br. 30-31. *Rowley* has been in place for over three decades and has been faithfully applied by the overwhelming majority of the courts of appeals during that time. *See* Pet. for Certiorari 11-13 (collecting cases from the courts of appeals). Coupled with new mandates from the ESEA—as well as provisions of the IDEA distinct from the FAPE provision—the result has been a remarkable increase in educational opportunity and outcomes, not a race to the bottom. Under IDEA amendments and the intertwined statutory standards from the ESEA, the expectations for school districts to serve students with disabilities have never been higher.

Looking at just one important policy goal—integration or inclusion—students with disabilities are educated in integrated classrooms far more often than ever before. From 2005 through 2014, the percentage of students ages 6 through 21 served under IDEA who were educated inside a regular classroom environment for the vast majority of the day increased from 53.6% to 62.6%. ANNUAL REPORT, at 49. And those students are achieving good outcomes in ever higher numbers. Graduation rates are up over the same period—increasing from 54.4% to 66.1%, *id.* at 62—in an era of increasingly rigorous academic standards for graduation in many states. *See* Br. For Nat'l Ass'n of State Directors of Special Educ. as *Amicus Curiae* in Support of Neither Party 8 ("State Director *Amicus* Br.") (describing increasing standards and graduation rates for special education students from 2000 to the present). At the same time, dropout rates are down, decreasing from 28.3% to 18.5%. ANNUAL REPORT, at 62. These successes demonstrate

that the "nation's educators" have been "aim[ing] high *every day in the field*," which benefits not only special education students but entire school communities. State Director *Amicus* Br. 10. There is no need to implement a more stringent (and judicially intrusive) substantive FAPE standard when schools are already obligated to meet demanding achievement goals *and* their efforts are largely working.

2. The upward trajectory of special education in the country has occurred not *despite* the "some benefit" standard illuminated in *Rowley* but, at least in part, *because* of that standard. Courts faithfully applying *Rowley* have proved competent—and empowered—to identify and ameliorate situations where school districts have fallen short of what the IDEA guarantees, while still affording school districts the necessary flexibility to make difficult judgments about how best to provide educational benefits.

The real-world experience under *Rowley* is thus far from the educational malpractice hypotheticals that Petitioner and the United States put forward, tellingly without any evidence that any has ever occurred. *See* Pet. Br. 17; U.S. Br. 30-31. And the evidence is to the contrary. Courts are amply able to provide a safeguard against the dreadful examples posited by the other side. Thus, a district court operating in a circuit that applies *Rowley*—*i.e.*, does not impose a heightened substantive standard—recently held that a school district denied FAPE to a deaf high school student when it provided, but then removed, a speech-to-text transcription technology, leaving the student with only an often-malfunctioning amplification system as assistive technology. *See DeKalb Cty. Bd. of Educ. v.*

Manifold, No. 4:13-CV-901-VEH, 2015 WL 3752036, at *5-6 (N.D. Ala. June 16, 2015); *contra* U.S. Br. 30 (hypothesizing that "some benefit" standard would permit a school district to provide a service for two months and then remove it for the rest of the year).

Numerous examples show that courts provide an effective check without the aid of a heightened substantive standard. First, courts ensure the substantive adequacy of an IEP by enforcing the procedures that the IDEA demands. *See Rowley*, 458 U.S. at 206. Thus a district court in the Ninth Circuit, following the "some educational benefit" and "basic floor of opportunity" standard, rather than a heightened standard, concluded that a school district had failed to provide FAPE to a deaf student when it refused to discuss a referral to the California School for the Deaf, notwithstanding the school district's provision of the curriculum in sign language. *J.G. ex rel. Jiminez v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 1286, 1288-89 (C.D. Cal. 2016). Similarly, the Second Circuit upheld a district court's finding that a school district committed a procedural violation that denied FAPE when it refused to discuss whether bullying was impeding a student's ability to receive educational benefits, without deciding whether the IEP was also substantively invalid. *T.K.*, 810 F.3d at 876 & n.3.

Examples like these demonstrate that by enforcing the IDEA's procedural safeguards, courts are able to police against IEPs that disregard entire aspects of a student's disability or learning needs, contrary to the United States' hypotheticals, U.S. Br. 30. *See, e.g.*, *Brown v. D.C.*, 179 F. Supp. 3d 15, 29 (D.D.C. 2016)

(holding school district denied FAPE when it "failed to convene a meeting or incorporate the effects of plaintiff's recent shooting-related injuries when implementing his IEP").

Moreover, courts armed by *Rowley*'s "some benefit" standard have effectively guarded against substantive failures as well as procedural ones. When the evidence demonstrates that an IEP is not reasonably calculated to convey educational benefits, courts have not hesitated to require alternatives. *See, e.g., C.D. v. New York City Dep't of Educ.*, No. 15-CV-2177(ARR)(JO), 2016 WL 3453649, *17 (E.D.N.Y. June 20, 2016) (rejecting community-school placement of a middle schooler with a speech-language impairment and epilepsy because the "record unmistakably shows that a community school recommendation was not conducive to the student's progress"); *J.L. v. Manteca Unified Sch. Dist.*, No. 2:14-01842 WBS EFB, 2016 WL 3277260, *8 (E.D. Cal. June 14, 2016) (applying "basic floor of opportunity" standard and holding that school district failed to provide FAPE to an autistic student when it provided only consultation and not "direct speech and language services"); *W.S. v. City Sch. Dist. of the City of New York*, No. 15 CV 3806-LTS, 2016 WL 2993208, *8 (S.D.N.Y. May 23, 2016) (holding school district's provision of a classroom setting with a certain staff ratio denied an autistic student FAPE even though that setting was "generally appropriate for students with autism," because no evidence indicated the student "was capable of making educational progress" in that environment); *S.C. v. Katonah-Lewisboro Cent. Sch. Dist.*, 175 F. Supp. 3d 237, 259 (S.D.N.Y. 2016) (finding district denied FAPE to a sixth grader with multiple disabilities when it offered

instruction in a 12-student classroom and record indicated the student "required a smaller class and one-to-one instruction").

Courts thus have not stood idly or powerlessly by under *Rowley*. Rather, the *Rowley* standard regularly provides courts workable tools to intervene when school districts fail, while preserving school districts' flexibility to continue to achieve ever higher measures of success for their special education students, and all students. There is no reason for the Court to alter a standard that Congress has left untouched, and that has allowed special education students to thrive for over 30 years.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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December 21, 2016

APPENDIX

APPENDIX

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Appendix 20 U.S.C. § 1415(f)(3)(E) 1a

20 U.S.C. § 1415(f)(3)(E) provides:

(E) DECISION OF HEARING OFFICER

(i) IN GENERAL – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) PROCEDURAL ISSUES – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.